

**STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT**

Appeal from the Court of Appeals
Jessica R. Cooper, Presiding Judge

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court No. 123554

V.

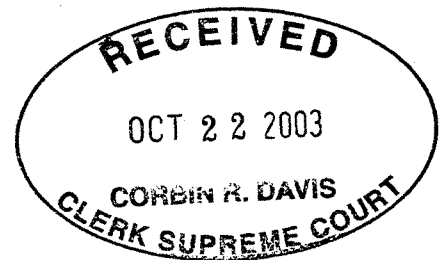
Court of Appeals No. 227941

JOSHUA M. COLE,

Defendant-Appellee.

Wayne Circuit Court No. 00-004731

DEFENDANT-APPELLEE'S BRIEF ON APPEAL



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STATEMENT OF JURISDICTION

Defendant-Appellee accepts Plaintiff-Appellant's Statement of Jurisdiction.

STATEMENT OF QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS CORRECTLY HOLD, BASED ON THE LAW AT THE TIME MR. COLE PERFORMED THE ACTS UPON WHICH HIS INVOLUNTARY MANSLAUGHTER CONVICTION WAS BASED, THAT THE EVIDENCE PRESENTED AT TRIAL WAS NOT LEGALLY SUFFICIENT TO SUSTAIN THAT CONVICTION?**

Plaintiff-Appellant said	“No”
Defendant-Appellee said	“Yes”

- B. Did The Court of Appeals Properly Review Mr. Cole’s Involuntary Manslaughter Conviction Based on this Court’s Definition of that Offense?**

Plaintiff-Appellant said	“No”
Defendant-Appellee said	“Yes”

- B. Is Plaintiff’s Contention that the Court of Appeals Erred by Finding that the Prosecution Presented Too Much Evidence Without Merit Because It is Inconsistent With Recent Decisions of this Court and the Rule that a Jury May Not Be Instructed on Any Lesser Included Offense Not Supported by a Rational View of the Evidence?**

Plaintiff-Appellant said	“No”
Defendant-Appellee said	“Yes”

- C. Is Plaintiff-Appellant’s reliance on People v Austin, 221 Mich 635 (1923) misplaced?**

Plaintiff-Appellant said	“No”
Defendant-Appellee said	“Yes”

- D. Would The Application of Any Change in the Definition of Involuntary Manslaughter to Mr. Cole’s Case Violate the Due Process Clause of the United States Constitution?**

Plaintiff-Appellant said	“No”
Defendant-Appellee said	“Yes”

STATEMENT OF FACTS

Mr. Cole accepts Plaintiff-Appellant's Statement of Facts with the following addition:

Mr. Cole was charged with poisoning, MCL 750.436(2), and involuntary manslaughter, MCL 750.321, in connection with the death of Samantha Reid from GHB intoxication. At trial, the prosecution's theory was that Mr. Cole was guilty of involuntary manslaughter because he acted in a grossly negligent manner by putting GHB or GBL in a drink he had reason to believe would be consumed by Reid. A jury ultimately found Mr. Cole guilty of the lesser offense of mixing a harmful substance in a drink, MCL 750.436(1), and involuntary manslaughter.

On appeal Mr. Cole challenged the sufficiency of the evidence presented to establish his involuntary manslaughter conviction, inter alia, on grounds that the jury's determination that he committed a felony by willfully placing a harmful substance in Reid's drink knowing that she might consume it to her detriment could not support a finding that he acted with gross negligence by putting that substance in her drink. The Court of Appeals agreed finding, based on this Court's definition of the elements of involuntary manslaughter in People v Ryczek, 244 Mich 106, 110 (1923) and People v Datema, 448 Mich 585, 596-97 (1995), that because placing a harmful substance in a drink is an unlawful act designated a felony it could not support a finding that Mr. Cole acted with gross negligence. The Court of Appeals also held that because Mr. Cole had been convicted of a felony, it would not be possible to convict him of involuntary manslaughter based on the misdemeanor-manslaughter rule.

This Court granted Plaintiff-Appellant's application for leave to appeal the March 27, 2003 decision of the Court of Appeals reversing Mr. Cole's involuntary manslaughter conviction in an order dated July 3, 2003.

I. THE COURT OF APPEALS CORRECTLY HELD, BASED ON THE LAW AT THE TIME MR. COLE PERFORMED THE ACTS UPON WHICH HIS INVOLUNTARY MANSLAUGHTER CONVICTION WAS BASED, THAT THE EVIDENCE PRESENTED AT TRIAL WAS NOT LEGALLY SUFFICIENT TO SUSTAIN THAT CONVICTION.

STANDARD OF REVIEW: Mr. Cole agrees that the standard of review is de novo. People v Carpentier, 446 Mich 19 (1994).

The implicit, if not explicit, thrust of Plaintiff-Appellant's argument is that because Mr. Cole, based on his conduct, deserved to be convicted of involuntary manslaughter¹ this Court should redefine the elements of that offense so as to include Mr. Cole's conduct. That contention should be summarily rejected. Claims that the current definition of involuntary manslaughter does not make sense in light of the decision in People v Aaron, 409 Mich 672 (1980) should be addressed to the Legislature, not this Court sitting in review of a Court of Appeals decision which Plaintiff-Appellant admits was based on this Court's decisions defining the elements of that offense. (Plaintiff-Appellant's Brief, p. 7, 15). See People v Ryczek, 224 Mich 106 (1923), People v Datema, 448 Mich 585 (1995). The sufficiency of the prosecution's proofs must be determined on the basis of the definitions in effect at the time Mr. Cole performed the acts on which the charges against him were based. To do otherwise would violate the constitutional prohibition against ex post facto laws. See Stogner v California, ___ US ___, 123 S Ct 2446, 156 L Ed 2d 544 (2003).

¹In its Brief on Appeal, Plaintiff-Appellant stated that the decision of the Court of Appeals caused "unnecessary further harm" to the family of Samantha Reid and should be reversed for "the sake of...[her] family". (Plaintiff-Appellant's Brief, p 13,19). These comments, a blatant appeal to sympathy for the victim, are inappropriate because the effect a decision might have on a victim's family is not relevant to an appellate court's resolution of the legal issues before it. See People v Watson, 245 Mich 572 (2000), People v Wise, 134 Mich App 82 (1984).

A. The Court of Appeals Properly Reviewed Mr. Cole's Involuntary Manslaughter Conviction Based on this Court's Definition of that Offense.

Plaintiff-Appellant's discussion regarding the common law history of homicide/manslaughter, while interesting, is of no relevance and provides no support for its position. The common law, like the electron in Heisenberg's Uncertainty Principle, is a moving target. Because, as Plaintiff-Appellant points out, the common law is constantly evolving, common law definitions of offenses are not fixed points but mere way stations on the long road from past to present. Common law definitions of involuntary manslaughter must therefore be viewed in their historical context: as representations of what the law was at a particular place and time in the past.

Were this Court starting with a clean slate and faced with the task of defining the offense of involuntary manslaughter in Michigan based on the common law of homicide/manslaughter, the evolving definitions of those offenses would be of great significance. This Court is not, however, either starting with a clean slate or being called upon to define the offense of involuntary manslaughter. Over 75 years ago, in People v Ryczek, *supra*, this Court reviewed the common law of homicide/manslaughter and defined the offense of involuntary manslaughter for purposes of the law of the State of Michigan. Over 70 years later, this Court reaffirmed that definition in People v Datema, *supra*. Because the Ryczek/Datema definition of involuntary manslaughter was in effect at the time he performed the acts on which the involuntary manslaughter charge against him was based, the Court of Appeals properly relied on that definition when reviewing the sufficiency of the prosecution's proofs.

Plaintiff-Appellant places great reliance on two brief quotations (a statement that "an unlawful act committed...in a grossly negligently manner" which causes death is involuntary

manslaughter and a statement that any unintentional killing was involuntary manslaughter unless it was murder, voluntary manslaughter, or excused) from People v Datema, supra, a decision on which the Court of Appeals also relied. Plaintiff's reliance on those two quotations is misplaced.

In Datema, the issue before the Court was whether the evidence presented at trial was sufficient to support an involuntary manslaughter conviction, absent a showing of gross negligence, where the death was the accidental result of a blow struck during a misdemeanor assault and battery. The Datema Court held that because an intent to injure was an element of assault and battery, the evidence was sufficient. In reaching this determination, the Datema Court quoted from People v Ryczek, supra, where this Court had previously defined involuntary manslaughter as:

the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.
[224 Mich at 110]. 448 Mich at 595-6.

The first quotation on which Plaintiff relies is part of a summary section which immediately follows an extended discussion of the misdemeanor-manslaughter rule, and the reference to an "illegal act" was clearly intended to refer to previously quoted language defining involuntary manslaughter as an accidental death arising out of "an illegal act not amounting to a felony". By taking the quoted language out of its context Plaintiff implies that the Datema Court had, without discussion or analysis, radically changed the law of involuntary manslaughter in Michigan by resolving a question it had expressly declined to resolve in People v Beach (Edwards), 429 Mich 450 (1988)—whether a manslaughter conviction can be based on an illegal act which is a felony. This Court's decision in People v Rode, 449 Mich 912 (1995), where it concluded that a person convicted of a felony was not entitled to an involuntary manslaughter instruction based on the misdemeanor-

manslaughter rule, precludes a finding that the Datema decision resolved that question in the affirmative.

The second quotation provides even less support for Plaintiff's position. As part of a discussion of the evolution of the law of involuntary manslaughter, the Datema Court quoted language from Perkins & Boyce, Criminal Law (3d ed) indicating that any unintentional killing was involuntary manslaughter unless it was murder, voluntary manslaughter, or excused. 448 Mich at 595. The Datema Court then stated that it had previously defined the offence of involuntary manslaughter in Michigan in People v Ryczek, *supra*. The language on which Plaintiff relies was therefore clearly not, as it implies, intended to reflect how the offense of involuntary manslaughter is defined in Michigan.

B. Plaintiff's Contention that the Court of Appeals Erred by Finding that the Prosecution Presented Too Much Evidence is Without Merit Because It is Inconsistent With Recent Decisions of this Court and the Rule that a Jury May Not Be Instructed on Any Lesser Included Offense Not Supported by a Rational View of the Evidence.

Plaintiff-Appellant vigorously argues that the Court of Appeals erred by finding that the prosecution presented "too much" evidence to support an involuntary manslaughter conviction. While that argument may have a certain superficial appeal, it is inconsistent both with recent decisions of the Court and the rule that a jury may not be instructed on any lesser included offense not supported by a rational view of the evidence.

This Court's decision in People v Edwards, one of the consolidated cases decided under the name of People v Beach, 429 Mich 450 (1988), and People v Rode, *supra*, are inconsistent with Plaintiff-appellant's contention that the Court of Appeals erred by holding that the prosecution erred by presenting "too much" evidence. In Edwards, the defendant argued that his second degree murder

conviction should be vacated because the trial judge denied his request to instruct on involuntary manslaughter. This Court held that no error occurred because the evidence presented at trial would not support an involuntary manslaughter conviction:

The Court of Appeals found that the elements of involuntary manslaughter preclude a conviction for that offense if the act causing death amounts to a felony. We do not rest our holding upon the finding of a felony, as did the Court of Appeals, but on the uncontroverted evidence of an unlawful act which naturally tends to cause death or bodily harm....The conduct in this case—the burning of a dwelling house in which residents were sleeping—does naturally tend to cause death or great bodily harm. Thus, regardless of the statutory degree of severity of the conduct, the unlawful act in this case could not meet the definition of involuntary manslaughter. Where the evidence suggests only that the criminal act naturally tends to cause death or great bodily harm, an instruction on the lesser included offense of involuntary manslaughter is simply not justified. 429 Mich at 475-8

Subsequently, in People v Rode, supra, this Court reinstated a second degree murder conviction by adopting the reasoning of the dissenting Court of Appeals judge. Relying on this Court's definition of the elements of involuntary manslaughter in People v Ryczek, supra, the dissenting judge reasoned that an erroneous instruction on the "gross negligence" element of involuntary manslaughter was harmless error because the undisputed facts, which established that the defendant had committed a felony which naturally tended to cause great bodily harm, could not support a finding of "gross negligence" as a matter of law:

the correct definition of gross negligence as defined by the Supreme Court is the commission of some lawful act, negligently performed.

...the trial court's erroneous instruction is not error requiring reversal because the circumstances of this case cannot, as a matter of law, meet the definition of involuntary manslaughter. Defendant Rode shot the gun several times at a moving car knowing that there were people in the car. The critical issue at trial was whether Rode or Gallina fired the gun over the roof of the Camaro, thereby firing

the fatal shot. The action of shooting a gun at a car being driven next to him knowing that there are people in the car constitutes an unlawful act, certainly this is an assault. Therefore, defendant Rode's action of shooting the gun at the car is the commission of an unlawful act and cannot, as a matter of law, meet the definition of "the commission of some lawful act, negligently performed." Further, Defendant Rode's action does not come within the definition of the misdemeanor-manslaughter rule because, while Rode committed an unlawful act in shooting the gun at a car full of people, this action is a felony and would naturally tend to cause death or great bodily harm...Therefore, I conclude that the trial court's reinstruction of gross negligence was technically incorrect, but was harmless beyond a reasonable doubt because defendant Rode's conduct cannot, as a matter of law, constitute involuntary manslaughter. (People v Rode, unpublished opinion per curiam of the Court of Appeals, decided March 3, 1995 (Docket No. 179942), dissenting opinion page 2) (copy attached).

Edwards and Rode clearly support the decision of the Court of appeals in the instant case. In the trial court, the prosecution took the position that putting a harmful substance in Reid's drink knowing she was likely to consume it to her detriment was not only a felony but an unlawful act which naturally tends to cause death or bodily harm. Consequently, it was not an act which could support a finding of involuntary manslaughter based on a theory of gross negligence.

The holdings in Edwards and Rode are also consistent with this Court holding in People v Cornell, 466 Mich 335 (2002) that a jury should not be instructed on any lesser offense not supported by a rational view of the evidence. Plaintiff-Appellant not only does not contest what it describes as "the Court of Appeals suggestion at oral argument that second degree murder would have been an appropriate charge here", but embraces it . (Plaintiff-Appellant's Brief, p. 18). Had Mr. Cole been charged with second degree murder, based on the decision in Edwards neither the prosecution nor the defense would have been entitled to an instruction on involuntary manslaughter because that offense was not supported by a rational view of the evidence (placing a harmful substance in a drink

is not only an unlawful act, which constitutes a felony, but one which naturally tends to cause great bodily harm). Because Mr. Cole would not have been entitled to an instruction on involuntary manslaughter as a lesser included offense of second degree murder because it was not supported by a rational view of the evidence, but would have had to face an all or nothing verdict on the charged offense of second degree murder, the prosecution should not have the option of avoiding an all or nothing verdict on second degree murder by charging him with involuntary manslaughter instead of second degree murder. To hold otherwise would not only violate the principle of reciprocity, MCR 6.201, People v Lemcool, 445 Mich 491 (1994), but would deny Mr. Cole his federal constitutional right to due process of law, US Const, Ams V & XIV.

C. Plaintiff-Appellant's reliance on People v Austin, 221 Mich 635 (1923) is misplaced.

Plaintiff-Appellant places great reliance on this Court's decision in People v Austin, 221 Mich 635 (1923). That reliance is misplaced. In Austin, there was a dispute as to whether the defendants knew that the drink which caused death contained poison. The only choice the jury was given was between finding the defendants guilty of first degree murder and not guilty. This Court found that because first degree murder required an intentional killing, it was error to deny the defendants' request for a manslaughter instruction (the Court did not discuss the absence of an instruction on second degree murder). The Austin Court did not discuss the elements of manslaughter, and the case was decided prior to the decisions in People v Ryczek, supra, and People v Datema, supra, where this Court defined the elements of involuntary manslaughter. Austin's precedential value is highly questionable in light of Ryczek, Datema, Edwards, and Rode.

Plaintiff-Appellant has consistently refused to acknowledge, let alone discuss or attempt to distinguish, the decisions in Ryczek, Edwards, and Rode. While Plaintiff-Appellant's attempts to

ignore these decisions is understandable because they are antithetical to its position, it is unreasonable for Plaintiff-Appellant to attempt to rely on a 75 year old decision without addressing intervening decisions of this Court which undermine any precedential value it might otherwise have had.² Plaintiff-Appellant's unwillingness to address the Edwards and Rode decisions should be treated as a tacit admission that they are on point and support Mr. Cole's position.

D. The Application of Any Change in the Definition of Involuntary Manslaughter to Mr. Cole's Case Would Violate the Due Process Clause of the United States Constitution.

Retroactive application of criminal laws violates the prohibition against ex post facto laws. US Const, Art I, § 10, cl 1, Ams V & XIV. As this Court observed in In re Certified Questions (Karl v Bryant Air Conditioning Co), 416 Mich 558, 572; 331 NW2d 456 (1982):

[R]etrospective application of a law is improper where the law "takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past." Hughes [v Judges' Retirement Bd, 407 Mich 75, 85; 282 NW2d 160 (1979)].

The United States Supreme Court has repeatedly held that the Ex Post Facto Clause, US Const, was intended to secure substantial personal rights against arbitrary and oppressive legislation. In Dobbert v Florida, 432 US 282, 292-293; 97 S Ct 2290; 53 L Ed 2d 344 (1977), the Court stated:

"It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when

²Counsel for Plaintiff-Appellant is clearly familiar with the decision in People v Rode, supra. The Wayne County Prosecutor's office, with represents Plaintiff-Appellant in the instant case, also represented Plaintiff-Appellant in Rode. In that case, the Wayne County Prosecutor's office asked this Court to adopt the reasoning of the dissenting judge, the same reasoning it now asserts is unsound. (Plaintiff-Appellant's Application for Leave to Appeal, People v Rode, SCt #102523, p 5-9) (copy attached). See Hurd v People, 25 Mich 405 (1972).

done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

An ex post facto law has also been defined by the United States Supreme Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime, or makes it greater than it was, when committed.'". Bouie v City of Columbia, 378 US 347, 353; 84 S Ct 1697; 12 L Ed 2d 894 (1964).

The United States Supreme Court recently upheld a challenge to an amendment to the California statute of limitations in sexual assault cases which extended the period in which charges could be brought on grounds that it violated the ex post facto provision of the United States Constitution. Stogner v California, supra. The Court reasoned that because the period in which charges could be brought had expired prior to the amendment being enacted, application of the statute to the petitioner was unconstitutional because it made criminal something that was not by depriving him of an available defense.

Although the Ex Post Facto Clause does not apply directly to the judiciary, Marks v United States, 430 US 188; 97 S Ct 990; 51 L Ed 2d 260 (1977), ex post facto principles are applicable to the judiciary by analogy through the Due Process Clauses of the Fifth and Fourteenth Amendments. Bouie v City of Columbia, supra. This Court has acknowledged the application of the ex post facto analogy to the judiciary first in People v Dempster, 396 Mich 700, 714-718; 242 NW2d 381 (1976), and later in People v Stevenson, 416 Mich 383, 395; 331 NW2d 143 (1982). Therefore, retroactive application of a judicial decision violates due process when it acts as an ex post facto law. As a result of the due process analogy, it has been stated that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law" Id. at 353

(emphasis added). "The retroactive application of an unforeseeable interpretation of a criminal statute, if detrimental to a defendant, generally violates the Due Process Clause." Hagan v Caspari, 50 F3d 542, 545 (CA 8, 1995) (emphasis added).

In Stevenson, this Court stated that "[p]roviding fair notice that conduct is criminal is one of the central values of the Ex Post Facto Clause . . . [b]ut fair notice is not the sole purpose of the clause." Id. at 396. Generally, the basic principles protected by the Due Process Clause guarantee preclude retroactive application of a "judicial construction of a criminal statute [that] is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue'" Bouie, supra at 354, quoting Hall, General Principles of Criminal Law (2d ed), p 61.

In this case, the decisions in People v Edwards, supra, and People v Rode, supra, represent this Court's last words on the subject of the elements of involuntary manslaughter prior to the date of the acts on which the charges against Mr. Cole was based. Based on the decision in Rode, a death which is the result of a felonious act naturally tending to cause death or serious injury can not be the basis for a manslaughter conviction. Consequently, based on the law in effect at the time he performed the acts on which his involuntary manslaughter conviction was based, Mr. Cole could not be guilty of involuntary manslaughter because the act which resulted in Reid's death was a felony which naturally tended to cause death or great bodily harm. Should this Court now choose to repudiate the Rode decision, and hold that a death resulting from a felonious act naturally tending to cause death or serious injury can be the basis for an involuntary manslaughter conviction, that would constitute a change in the law. Applying that change in the law ex post facto to Mr. Cole's case would deny Mr. Cole his federal constitutional right to due process of law because it violates the prohibition against the retroactive application of criminal laws by making criminal what was not

criminal at the time of the act. Stogner v California, supra, Bouie v City of Columbia, supra, Hagan v Caspari, supra, People v Stevenson, supra.

SUMMARY AND RELIEF

WHEREFORE, for all of the above reasons, Mr. Cole asks this Court to affirm the decision of the Court of Appeals.

Date: 10/20/03

Respectfully submitted,



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Attachment A: Unpublished Court of Appeals Opinion in
People v Rode CCA# 179441, rel. 3/3/95
STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

ALDO SAM GALLINA

Defendant-Appellant.

UNPUBLISHED

March 3, 1995

No. 179941

LC No. 89-8193

ON REMAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC CHRISTOPHER RODE,

Defendant-Appellant.

No. 179942

LC No. 89-8193

ON REMAND

Before: Fitzgerald, P.J., and Hood and Jansen, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court. In a previous opinion,¹ we reversed the defendant's convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The Supreme Court reversed our judgment and remanded for consideration of the other issues raised in this Court that we did not address.² We affirm defendant Gallina's conviction and remand for further proceedings consistent with this opinion. We reverse defendant Rode's conviction and remand for a new trial.

Defendant Rode contends that in three instances the trial court reversibly erred in its jury instructions. The first alleged error occurred when the trial court gave supplemental instructions on second-degree murder and involuntary manslaughter after both juries asked for further instructions on these charges.³ Specifically, defendant Rode's jury inquired whether voluntary manslaughter and second-degree murder were the same crime, and requested written definitions of first-degree murder, second-degree murder, involuntary manslaughter, and careless or negligent use of a firearm. In response, the trial court gave the jury a written chart that listed the elements for each offense. The trial court also invited the jury to submit additional questions if further clarification was needed.

Defendant objected to the definition of involuntary manslaughter in relation to the definition of second-degree murder that was contained in the chart. The elements of second-degree murder were delineated as: (1) victim's death, (2) death within county, (3) death caused by defendant, (4) death not excused or mitigated to manslaughter, and (5) defendant actually intended to kill victim, or defendant intended to do great bodily harm to victim, or defendant intended to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result of his

conduct. The elements of involuntary manslaughter were delineated as: (1) the deceased died on the date in question, (2) his death was caused by an act of the defendant, and (3) that the defendant's act was one of gross negligence.

Defendant Rode argued that it was unfair for the trial court to give a more extensive instruction on the intent requirement for second-degree murder than on the intent requirement for involuntary manslaughter. Defendant Rode requested the trial court to give a supplemental instruction on gross negligence like the one initially given to the jury. The trial court responded that if it gave a supplemental instruction on gross negligence it would use the definition provided by case law rather than the definition initially given because the initial definition was "wrong" and "inadequate."

In the initial instructions, the trial court defined gross negligence, in part, as the defendant's failure to "use such ordinary care and diligence to prevent the threat and danger when to the ordinary mind it must have been apparent that the result was likely to cause serious harm to another." This definition is the standard definition embodied in CJI2d 16.18; People v Zak, 184 Mich App 1, 7; 457 NW2d 59 (1990). In the supplemental instructions, the trial court erroneously defined gross negligence, in part, as the doing of "an unlawful act that does not naturally tend to cause death or great bodily harm or a high degree or risk of death or great bodily harm."⁴ Given this later definition, the jury was less likely to convict of involuntary manslaughter because this definition applied only to acts not likely to cause death or great bodily harm. Clearly, firing a gun is an act that naturally tends to cause death or great bodily harm. Had the trial court restated the initial definition of gross negligence, there is a strong possibility that the jury would have convicted defendant Rode of involuntary manslaughter. Hence, the error was not harmless beyond a reasonable doubt. People v Thinel (On Remand), 164 Mich App 717, 720-21; 417 NW2d 585 (1987).

Defendant Rode also asserts that the trial court erred in omitting an instruction on specific intent with regard to the charge of first-degree murder. Any error was harmless because defendant was convicted of second-degree murder, which is not a specific intent crime. People v Curry, 175 Mich App 33, 39-40; 437 NW2d 310 (1989).

Last, defendant Rode maintains that the trial court erred in instructing the jury to view the codefendant's testimony with suspicion. While we agree that a jury instruction that leads a jury to consider a defendant's testimony different from any other witnesses' testimony may be reversible error, see People v Bonner, 116 Mich App 41, 49; 321 NW2d 835 (1982), in this case defendant has not convincingly showed that reversible error occurred.⁵ Indeed, it is possible that the accomplice instruction might have aided defendant Rode against the implicating testimony of defendant Gallina.

Both defendants argue that the trial court abused its discretion in sentencing them as adult offenders. We disagree. The trial court properly considered the criteria listed in MCR 6.931(E)(2) and MCL 769.1(3); MSA 28.1072(3) before deciding to sentence the defendants as adults.

Both defendants also contend that the trial court erred in sentencing them as though they have been convicted of first-degree murder.⁶ We disagree. A thorough review of the trial court's comments at sentencing reveals that the trial court did not make an independent finding of guilt and impose sentence according to this finding. The trial court specifically stated that it was not sentencing for first-degree murder. Further, it is not error for a trial court to take an acquittal into account at sentencing. See People v Ewing, 435 Mich 443; 458 NW2d 880 (1990).

Defendant Rode also argues that the trial court erred in scoring Offense Variable 3, OV 6, OV 9, and OV 13. Because defendant only challenged the scoring of OV 9 and OV 13, only the accuracy of these two guidelines calculations is preserved for appellate review. People v Kaczorowski, 190 Mich App 165, 173; 475 NW2d 861 (1991).

Appellate review of guidelines calculations is very limited. People v Harris, 190 Mich App 652, 663; 476 NW2d 767 (1991). A sentencing judge has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports a particular score. Id. The Sentence Review Committee strongly recommends that this Court uphold scoring decisions for which there is any evidence in support. People v Reddish, 181 Mich App 625, 628; 450 NW2d 16 (1989). The record contains sufficient evidence to support the trial court's score of ten points for OV 9 and five points for OV 13.

Last, both defendants contend that their life sentences are disproportionate. The sentencing decision in this case, which is a departure from the guidelines' recommended range, was imposed without the benefit of People v Milbourn, 435 Mich 630; 461 NW2d 1 (1990). Therefore, we remand Defendant Gallina's case to the Recorder's Court for that court to determine, in light of Milbourn, whether a resentencing is appropriate. ⁷ People v Martin, 440 Mich 868 (1992); People v Herron, 440 Mich 868 (1992). Given our decision to reverse defendant Rode's conviction, it is unnecessary to remand that case to the trial court for consideration of whether resentencing is appropriate.

In docket number 179941, defendant Gallina's conviction is affirmed and the case is remanded to the trial court for a determination of whether resentencing is appropriate. In docket number 179942, defendant Rode's conviction is reversed and the case is remanded for a new trial. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood

¹ People v Rode & Gallina, 196 Mich App 58; 492 NW2d 483 (1992).

² All but two of the issues raised by the defendants were addressed in our previous opinion. The prosecutor's argument that the felony-firearm convictions should be reinstated is not properly before us pursuant to the Supreme Court's order remanding the case "to the Court of Appeals for consideration of the other issues raised in the Court of Appeals by the defendant but which were not addressed by that Court."

³ Defendant Rode concedes that the initial instructions regarding second-degree murder and involuntary manslaughter were properly given.

⁴ The trial court did not clearly state the source of this definition or why it believed that the initial instruction was inadequate.

⁵ Our research has unveiled no Michigan case where it was found that a trial court reversibly erred by giving an accomplice instruction.

⁶ Although we are reversing defendant Rode's conviction, we are reviewing this issue with respect to both defendants in the interest of judicial economy.

⁷ On remand, the case will be assigned to a new judge because Judge Talbot is no longer a Recorder's Court judge.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALDO SAM GALLINA,

Defendant-Appellant.

UNPUBLISHED

No. 179941
LC No. 89-008193
ON REMAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC CHRISTOPHER RODE,

Defendant-Appellant.

No. 179942
LC No. 89-008193
ON REMAND

Before: Fitzgerald, P.J., and Hood and Jansen, JJ.

JANSEN, J. (concurring in part and dissenting in part).

I concur in the majority's opinion that defendant Gallina's conviction of second-degree murder should be affirmed for the reasons set forth in the majority's opinion. I also believe that defendant Gallina is entitled to resentencing, and I note that defendant Gallina's sentencing guidelines range was 96 to 300 months. Thus, the life sentence imposed exceeded the guidelines range. However, the trial court articulated no reasons not included within the sentencing guidelines to justify such a departure. On remand, the trial court, if it decides to depart from the sentencing guidelines, must articulate factors not included within the guidelines range or factors not adequately accounted for by the guidelines both on the record and on the sentencing information report departure form. People v Fleming, 428 Mich 408, 428; 410 NW2d 266 (1987); People v Milbourn, 435 Mich 630, 657, 660; 461 NW2d 1 (1990).

I respectfully dissent from the reversal of defendant Rode's conviction due to instructional error. I would affirm defendant Rode's conviction of second-degree murder, and remand for a determination of resentencing.

Defendant Rode complains of the trial court's reinstruction concerning the definition of involuntary manslaughter. The trial court gave the following reinstruction on involuntary manslaughter:

The definition then of involuntary manslaughter is involuntary manslaughter is the killing of another person unintentionally. It's the doing of an act with an unreasonable disregard for life. It is acting in wilful, wanton and reckless disregard of the consequences which might follow from one's actions and indifference to the rights of others. It is in the doing of an unlawful act that does not naturally tend to cause death or great bodily harm or a high degree of risk of death or great bodily harm.

Jury instructions are read in their entirety to determine if error requiring reversal occurred. Instructions which are somewhat imperfect are acceptable so long as they fairly present to the jury the issues to be tried and sufficiently protect the rights of the defendant. People v Gaydosh, 203 Mich App 235, 237; 512 NW2d 65 (1994). No error results from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction. People v Harris, 190 Mich App 652, 664; 476 NW2d 767 (1991).

Involuntary manslaughter is the killing of another without malice and unintentionally, (1) in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or (2) in negligently doing some lawful act itself, or (3) by the negligent omission to perform a legal duty. People v Ryczek, 224 Mich 107, 110; 194 NW 609 (1923); People v Townes, 391 Mich 578, 590; 218 NW2d 136 (1974); People v Richardson, 409 Mich 126, 135-136; 293 NW2d 332 (1980); People v Beach, 429 Mich 450, 477; 418 NW2d 861 (1988); People v Heflin, 434 Mich 482, 507-508; 456 NW2d 10 (1990). The trial court's instruction that gross negligence is the doing of "an unlawful act that does not naturally tend to cause death or great bodily harm or a high degree of risk of death or great bodily harm" is erroneous because that definition is the so-called "misdemeanor-manslaughter" rule. Rather, the correct definition of gross negligence as defined by the Supreme Court is the commission of some lawful act, negligently performed.

However, the trial court's erroneous instruction is not error requiring reversal because the circumstances of this case cannot, as a matter of law, meet the definition of involuntary manslaughter. Defendant Rode shot the gun several times at a moving car knowing that there were people in the car. The critical issue at trial was whether Rode or Gallina fired the gun over the roof of the Camaro, thereby firing the fatal shot. The action of shooting a gun at a car being driven next to him knowing that there are people in the car constitutes an unlawful act; certainly this is an assault. Therefore, defendant Rode's action of shooting the gun at the car is the commission of an unlawful act and cannot, as a matter of law, meet the definition of "the commission of some lawful act, negligently performed." Further, defendant Rode's action does not come within the definition of the misdemeanor-manslaughter rule because, while Rode committed an unlawful act in shooting a gun at a car full of people, this action is a felony and would naturally tend to cause death or great bodily harm. Beach, *supra*, p 477. Therefore, I conclude that the trial court's reinstruction of gross negligence was technically incorrect, but was harmless beyond a reasonable doubt because defendant Rode's conduct cannot, as a matter of law, constitute involuntary manslaughter. MCL 769.26; MSA 28.1096; MCR 2.613(A); People v Mosko, 441 Mich 496; 495 NW2d 534 (1992).

Additionally, the majority's concern that the trial court's reinstruction concerning gross negligence is not the same as that embodied in the standard criminal jury instructions is not dispositive. Under Supreme Court precedent, the second element still requires the commission of some lawful act, negligently performed. Heflin, *supra*, p 508. Here, there was no lawful act negligently performed. Thus, even if the trial court had given the definition of gross negligence as set forth in CJI2d 16.18, the jury could still find defendant Rode guilty of second-degree murder. Defendant Rode did not negligently perform some lawful act. By his own admission, he fired a gun several times at the car next to him knowing that there were people in the car. This cannot constitute a lawful act.

I also note that the criminal jury instructions regarding involuntary manslaughter are in conflict with existing case law. CJI2d 16.10 includes the requirement of gross negligence under the misdemeanor-manslaughter situation. The commentary following this instruction notes that the requirement of gross negligence in the misdemeanor-manslaughter situation is in conflict with current case law, but that the rules committee chose to retain the gross negligence requirement believing that it is a common element in all involuntary manslaughter prosecutions predicated on a claimed statutory

violation. The criminal jury instruction appears to add more confusion, rather than clarification, to the definition of involuntary manslaughter. Thus, it is incumbent upon trial judges to carefully examine the criminal jury instruction on involuntary manslaughter because the Michigan Criminal Jury Instructions do not have the official sanction of our Supreme Court. People v Petrella, 424 Mich 221, 277; 380 NW2d 11 (1985).

Accordingly, even if the trial court's reinstruction concerning the definition of gross negligence for purposes of involuntary manslaughter was error, the error was harmless beyond a reasonable doubt.

Accordingly, even if the trial court's reinstruction concerning the definition of gross negligence for purposes of involuntary manslaughter was error, the error was harmless beyond a reasonable doubt.

I concur in the majority's rejection of the other of defendant Rode's claimed instructional errors. I further concur in the majority's resolutions of defendant Rode's claimed sentencing errors. However, because I would affirm defendant Rode's conviction of second-degree murder, I would remand to the trial court to determine, in light of Milbourn, whether a resentencing is appropriate. People v Martin, 440 Mich 868 (1992); People v Herron, 440 Mich 868 (1992); People v Austin, 440 Mich 886 (1992).

/s/ Kathleen Jansen

Attachment B: Persecution's Application for
Leave to Appeal in Perpetua
(Sct. # 102534)

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

VS

ERIC RODE & ALDO GALLINA,

Defendant-Appellees.

Court of Appeals

No: 179942

179941 3/3/95 PC Opin

Detroit Recorder's Court No: 89-08193

Banker 26615

Esper 26430

+ (19) amicus (25) X-APP Talbot, J. 21245

+ (24) amicus (28) X-APP

NOTICE OF HEARING

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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FILED

MAR 23 1995

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

STATEMENT OF MATERIAL FACTS AND JUDGMENT APPEALED FROM

Defendants were convicted of second degree murder and felony-firearm. A severance was granted prior to trial on the ground of inconsistent defenses, and two juries impanelled. The trial judge later held that once each defendant took the stand he waived his Fifth Amendment rights, and that the testimony would be heard by both juries, as each jury had only the culpability of one defendant before it.

The Court of Appeals concisely stated the facts essentially as follows:

On July 2, 1989, defendants were riding around in a Camaro with some high school friends. The Camaro was owned by defendant Gallina's cousin, Frank Kuhne. Defendant Gallina, age 15, was seated in the front passenger seat, and defendant Rode, age 16, was in the passenger side backseat (15, 87, 88a).^{*} A Mustang pulled up beside the Camaro and the Mustang's occupants, Edward and Charles Schramek, indicated that they wanted to race. When the cars were side-by-side, Charles and the occupants of the Camaro began shouting at each other. According to some of the testimony, Charles shouted, "You're lucky we don't pull our gun out and shoot you" (18, 90-91a). At that point, defendant Gallina pulled a gun out from the front panel of the car, where

^{*} page references are to the appellant's appendix filed in this court on the initial appeal.

he knew his cousin kept it, and fired it out the window more than once. Defendant Rode then took the gun from defendant Gallina. Defendant Gallina testified that defendant Rode said, "If you are not going to shoot at them, I will" (282 a)." Defendant Rode fired the gun toward the tires of the Mustang (274a).

Defendant Rode testified that after he shot toward the tires, the gun went back to defendant Gallina, who shot the gun again (219-227a). Defendant Rode then reloaded the gun with bullets supplied by defendant Gallina. The Mustang continued to follow the Camaro. The driver of the Camaro stopped the car suddenly, and as the Mustang passed the driver side of the Camaro, one of the defendants pulled himself up out of the passenger side window and shot several times over the roof of the Camaro into the passenger side of the Mustang. Charles was killed by one of these shots.

Each defendant testified after the prosecutor rested. Both defendants denied firing the gun over the roof as the Mustang passed the Camaro, and each claimed that the other defendant fired the gun (223, 274a). Jonathan Warmack, who was driving the Camaro, testified that defendant Gallina did not fire the gun when the Mustang was passing (118-120a). Warmack also testified that after the Mustang passed by, defendant Rode said, "I know I hit him" (118-120a). Brad Andrews, who was in the driver side backseat, made a statement to the police wherein he said that defendant Rode fired the gun over the roof as the Mustang was passing (174-175a). At trial, Andrews testified

that he did not see defendant Rode fire the gun as the Mustang passed, but he did see defendant Gallina reach out the window and fire the gun once the Mustang had passed (146-147a). James Kelly, who was seated in the middle backseat, testified that defendant Gallina fired the gun over the roof as the Mustang was passing, and then defendant Rode leaned out the window and fired the gun as the Mustang drove off (198-209a).

The Court of Appeals found error in allowing each jury to here the conflicting testimony of the defendants, and reversed the convictions. The court also held that the convictions for felony-firearm were improper, that offense not being an "automatic waiver" enumerated offense, and this court has now held to the contrary. The People sought leave, which was granted. This court then reversed the Court of Appeals, reinstating the murder convictions, and remanding (after defendants' motions for reconsideration on the point) for consideration of the remaining issues. The court did not mention the felony-firearm convictions. On remand, the majority of the Court of Appeals panel reversed the conviction of defendant Rode on the ground of an erroneous instruction on involuntary manslaughter, over the dissent of Judge Jansen, and remanded defendant Gallina's case for reconsideration of the sentence in light of Milbourn. The People again seek leave.

I.

IT CANNOT BE SAID THAT A PARTIALLY
ERRONEOUS INSTRUCTION ON
INVOLUNTARY MANSLAUGHTER WAS
HARMFUL UNDER ANY STANDARD OF
REVIEW WHERE THE DEFENDANT WAS
CONVICTED OF SECOND DEGREE MURDER,
AND WHERE, ON THE FACTS OF THE
CASE, NO INSTRUCTION ON
INVOLUNTARY MANSLAUGHTER WAS
REQUIRED, THERE BEING A DELIBERATE
ATTEMPT TO INJURE IN THIS CASE,
AND NOT ANY ACT OF NEGLIGENCE,
GROSS OR OTHERWISE.

On July 2, 1989, defendants were riding around in a Camaro with some high school friends. The Camaro was owned by defendant Gallina's cousin, Frank Kuhne. Defendant Gallina, age 15, was seated in the front passenger seat, and defendant Rode, age 16, was in the passenger side backseat. A Mustang pulled up beside the Camaro and the Mustang's occupants, Edward and Charles Schramek, indicated that they wanted to race. When the cars were side-by-side, Charles and the occupants of the Camaro began shouting at each other. According to some of the testimony, Charles shouted, "You're lucky we don't pull our gun out and shoot you." At that point, defendant Gallina pulled a gun out from the front panel of the car, where he knew his cousin kept it, and fired it out the window more than once. Defendant Rode then took the gun from defendant Gallina. Defendant Gallina testified that defendant Rode said, "If you are not going to shoot at them, I will." Defendant Rode fired the gun toward the tires of the Mustang.

Defendant Rode testified that after he shot toward the tires, the gun went back to defendant Gallina, who shot the gun again. Defendant Rode then reloaded the gun with bullets supplied by defendant Gallina. The Mustang continued to follow the Camaro. The driver of the Camaro stopped the car suddenly, and as the Mustang passed the driver side of the Camaro, one of the defendants pulled himself up out of the passenger side window and shot several times over the roof of the Camaro into the passenger side of the Mustang. Charles was killed by one of these shots.

Each defendant testified after the prosecutor rested. Both defendants denied firing the gun over the roof as the Mustang passed the Camaro, and each claimed that the other defendant fired the gun. Jonathan Warmack, who was driving the Camaro, testified that defendant Gallina did not fire the gun when the Mustang was passing. Warmack also testified that after the Mustang passed by, defendant Rode said, "I know I hit him." Brad Andrews, who was in the driver side backseat, made a statement to the police wherein he said that defendant Rode fired the gun over the roof as the Mustang was passing. At trial, Andrews testified that he did not see defendant Rode fire the gun as the Mustang passed, but he did see defendant Gallina reach out the window and fire the gun once the Mustang had passed. James Kelly, who was seated in the middle backseat, testified that defendant Gallina fired the gun over the roof as the Mustang was passing, and then defendant Rode leaned out the window and fired the gun as the Mustang drove off.

The majority of the panel of the Court of Appeals has reversed the conviction of defendant Rode again, on the ground of an erroneous reinstruction on involuntary manslaughter. The trial judge instructed that involuntary manslaughter is the "doing of an act with an unreasonable disregard for life. It is acting in wilful, wanton and reckless disregard of the consequences which might follow from one's actions and indifference to the rights of others. It is the doing of an unlawful act that does not naturally tend to cause death or great bodily harm or a high degree of risk of death or great bodily harm" (emphasis added). In short, the trial judge combined, in a sense, instructions on manslaughter by gross negligence with what might be termed "unlawful act" or "misdemeanor" manslaughter. The majority of the panel found reversible error because had the reinstruction not been couched in this manner, concluded the majority, there was a "strong possibility that the jury would have convicted defendant Rode of involuntary manslaughter." The dissent strongly disagreed, on the ground that on the facts no instruction on involuntary manslaughter was warranted. The People submit that the dissent clearly has the better of the argument.

The error of the majority's position is revealed at the outset by its internal contradiction. The court held that absent the erroneous instruction the jury might well have convicted defendant Rode of involuntary manslaughter by gross

Attachment B PR

negligence. However, the court found the instruction erroneous precisely because on the facts of this case "firing a gun is an act that naturally tends to cause death or great bodily harm." But, given that there was no dispute that the gun was deliberately and not accidentally or recklessly fired at the auto in which the deceased was riding, the dispute being over the respective roles of the two defendants, on what facts is any instruction on involuntary manslaughter based?

The dissent makes precisely this point. As Judge Jansen states: "Defendant Rode shot the gun several times at a moving car knowing that there were people in the car....defendant Rode's action of shooting the gun at the car is the commission of an unlawful act and cannot, as a matter of law, meet the definition of 'the commission of some lawful act, negligently performed.'" Slip opinion, dissent at 2. Judge Jansen correctly concluded that though the trial court's reinstruction was "technically incorrect," it was harmless because defendant's conduct could "not, as a matter of law, constitute involuntary manslaughter." Dissent, at 2.

Appellant would note that both the majority and dissent discuss the harmless error issue in terms of harmlessness beyond a reasonable doubt. While the People submit that the facts of this case readily meet that test, there is also a question as to whether that test is the appropriate one, it being arguable that not every misinstruction on the elements

Attachment D p.9

of an offense, particularly a lesser included offense rather than the offense for which the defendant was convicted, constitutes constitutional error.

To put the family of the victim through a second trial where the error, such as it was, could have had no conceivable effect on the outcome of the case, is to inflict gratuitous harm upon them, and is not required to achieve justice, but instead inflicts injustice. The dissent is correct, and the Court of Appeals should be reversed.